

were not articulated until the issuance of the Policy Statement is fundamentally unfair and violates the essential due process requirement of full prior notice.<sup>10/</sup>

34. The Supreme Court has made clear that agencies may not generally adopt rules with retroactive effect unless Congress has made a specific grant of retroactive rulemaking authority, something Congress did not do in the Communications Act of 1934.<sup>11/</sup> As the Court stated in Bowen, "retroactivity is not favored in the law."<sup>12/</sup> In Bowen, the Supreme Court struck down an attempt by the Department of Health and Human Services to apply Medicare hospital cost-reimbursement limits, adopted in 1984, retroactively to 1981.

35. The Supreme Court's position that actions are governed by the laws in effect at the time the actions took place is exemplified by Greene v. United States.<sup>13/</sup> There, the

---

<sup>10/</sup> The essential requirements of a change in policy are clear:

"Although an administrative agency is not bound to rigid adherence to its precedents, it is equally essential that when it decides to reverse its course, it must give notice that the standard is being changed . . . and apply the changed standard only to those actions taken by parties after the new standard has been proclaimed as in effect." (emphasis added)

RKO General, Inc. v. FCC, 670 F.2d 215, 224 (D.C. Cir. 1981) (quoting Boston Edison Co. v. FPC, 557 F.2d 845, 849 (D.C. Cir.), cert. denied sub nom. Towns of Norwood, Concord, and Wellesley, Mass. v. Boston Edison Co., 434 U.S. 956 (1977)), cert. denied, 456 U.S. 927 (1982).

<sup>11/</sup> See Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988) ("Bowen").

<sup>12/</sup> Id. at 208.

<sup>13/</sup> Greene v. United States, 376 U.S. 149 (1964) ("Greene").

petitioner, an employee of a Navy contractor, was dismissed in 1953 when his company was terminated by the Navy. Six years later, the Supreme Court found that the Navy's dismissal of the petitioner and his company was unlawful. At that time, a government regulation provided for restitution for the contractor employee in any case where the termination had been finally adjudicated unlawful. In 1960, six months after the petitioner submitted his claim for restitution, however, that regulation was modified to substantially narrow the circumstances under which a terminated contractor could receive restitution. The petitioner was denied restitution on the basis of the modified 1960 regulation. The Court found that "[w]hatever petitioner's rights are, there can be no doubt they matured and were asserted under the 1955 directive."<sup>14/</sup> The Court thus held that the petitioner was entitled to restitution under the 1955 regulation in effect at the time of his claim.

36. Because the EEO standards announced in the Policy Statement depart significantly from the Commission's prior EEO decisions, retroactive enforcement of those standards violates established concepts of fairness.<sup>15/</sup> Many licensees have adopted EEO programs based on their understanding of the

---

<sup>14/</sup> Id. at 160.

<sup>15/</sup> The Commission's 1987 EEO Report reoriented the Commission's EEO focus from statistical employment profile analyses to concentration on actual recruitment efforts. The Policy Statement, however, threatens to sanction licensees for failing to attract an "adequate" applicant pool despite either substantial recruitment efforts or demonstrated hiring of minorities and females.

Commission's standards prior to the issuance of its Policy Statement. To impose sanctions on these licensees now for actions which the Commission did not specify would be considered EEO violations until the issuance of its Policy Statement unfairly penalizes licensees without cause.

**2. The Commission Must Use A "Notice and Comment" Proceeding to Enact the Substantive Revisions to EEO Policy Set Forth in the Policy Statement**

37. If the Commission expects licensees to abide by substantive guidelines as to their EEO practices on pain of forfeiture, it should propose rules which will be subject to notice and comment. Section 553 of the Administrative Procedure Act requires agencies to follow notice and comment procedures prior to adopting substantive rules.<sup>16/</sup> Policy statements which act prospectively are excepted from the notice and comment requirements.<sup>17/</sup> In Pacific Gas & Electric Co. v. FPC,<sup>18/</sup> the court stated that:

[a] general statement of policy . . . does not establish a "binding norm." It is not finally determinative of the issues or rights to which it is addressed. The agency cannot apply or rely upon a general statement of policy as law because a general statement of policy only announces what the agency seeks to establish as policy. A policy statement announces the agency's tentative intentions for the future.<sup>19/</sup>

---

<sup>16/</sup> 5 U.S.C. § 553.

<sup>17/</sup> 5 U.S.C. § 553(b).

<sup>18/</sup> Pacific Gas & Electric Co. v. FPC, 506 F.2d 33 (D.C. Cir. 1974).

<sup>19/</sup> Id. at 38.

Far from reflecting the Commission's tentative future intentions, the Policy Statement announces new and unprecedented standards for assessing forfeitures for past EEO conduct and establishes a "binding norm" which it expects licensees to follow, and apparently expected licensees to follow in the past. The Policy Statement's abrupt departure from prior practice, with absolutely no prior notice to affected licensees, violates both administrative policy and basic notions of fairness because of its retroactive enforcement. The Commission, therefore, cannot rely upon the Policy Statement as authority for imposing sanctions on particular licensees whose past actions are found to have violated its new standards.

**3.    The Policy Statement Violates the Principles of Melody Music**

38. The Commission has an obligation to treat similarly situated applicants in an even-handed manner.<sup>20/</sup> While the Commission claims that the EEO Policy Statement is not a change in the Commission's rules, but only a clarification, the Policy Statement nonetheless presents a radical departure from sanctions previously imposed. An examination of cases decided before and after the February 1, 1994 enactment of the Policy Statement indicates that in the past, violations received significantly lower sanctions than do similar violations judged under the new policy.

---

20/ See Melody Music, Inc. v. FCC, 345 F.2d 730 (D.C. Cir. 1965) ("Melody Music").

39. In Eagle Radio,<sup>21/</sup> decided under the Policy Statement, a licensee, in Fort Worth, Texas, had minorities present in 11 of 47 applicant and interview pools, and hired 10 minorities between 1987 and 1990. When the licensee's 1990 renewal application was acted on by the Commission in 1994, the FCC imposed a \$25,000 fine, reporting conditions and a short-term renewal. A second licensee, in Midland, Texas, had minorities present in seven of 29 applicant and interview pools, and hired four minorities. For this level of recruiting, the licensee received a \$25,000 fine, reporting conditions, and a short term renewal.

40. However, other licensees that had similar conduct during the late 1980's received significantly lower penalties merely because the Commission processed their renewal applications prior to the enactment of the Policy Statement. For example, in Double L Broadcasting of Lansing Limited Partnership,<sup>22/</sup> a licensee had minorities in only five applicant pools out of 16 upper-level positions -- and received only an admonishment. Moreover, in Radio Seaway, Inc.,<sup>23/</sup> a Cleveland, Ohio FM station had 31 full-time positions during the license term. The licensee failed even to contact outside referral sources for 20 of those 31 openings, and apparently did not begin affirmative recruitment for job vacancies until the EEO reporting

---

<sup>21/</sup> See supra n.8.

<sup>22/</sup> Double L Broadcasting of Lansing Limited Partnership, 7 FCC Rcd 6435, 6438 (1992).

<sup>23/</sup> Radio Seaway, Inc., 7 FCC Rcd 5965 (1992).

year. For this, the licensee received only reporting conditions and no fine.<sup>24/</sup>

41. Similar penalties were imposed in Certain Broadcast Stations Serving Communities in the Sarasota, Florida Area and Other Florida Communities.<sup>25/</sup> An Orlando licensee hired only three minorities out of 47 overall positions, and only four out of 130 interviewees were minorities. The licensee received only reporting conditions, and no fine.<sup>26/</sup> In the same decision, a Tallahassee licensee received only reporting conditions for hiring only two minorities out of 14 job vacancies, and only having six minorities among 61 interviewees.<sup>27/</sup> A second Tallahassee licensee could identify the referral source for only nine out of 27 hires, only knew the number of minority interviewees for two positions, and only hired three minorities, yet received reporting conditions and a \$2,000 fine.<sup>28/</sup> These

---

<sup>24/</sup> Id. at 5968.

<sup>25/</sup> Certain Broadcast Stations Serving Communities in the Sarasota, Florida Area and Other Florida Communities, 5 FCC Rcd 5683 (1990).

<sup>26/</sup> Id. at 5684.

<sup>27/</sup> Id. at 5684-85.

<sup>28/</sup> Id. at 5685. See also Spectacor Broadcasting L.P., 9 FCC Rcd 1729, 1730-31 (1993) (licensee who was able to identify recruiting sources for only seven of 37 hiring opportunities, and had only 12 minorities out of 144 interviewees received a full-term renewal, reporting conditions and a \$12,500 fine); Niles Broadcasting Company, 7 FCC Rcd 5959, 5960 (1992) (licensee who only recruited for four of 10 openings, had only 5 minority applicants, and did not assess its EEO efforts until the last few months of the license term received reporting conditions for three years); Goodrich Broadcasting, Inc., 7 FCC Rcd 6655, 6656-57 (1992) (continued...)

cases demonstrate the clear departure from past practices which was occasioned by the Policy Statement.

42. This uneven treatment of applicants governed by the same policy demonstrates the problems inherent in the Commission's unlawful retroactive application of its Policy Statement and clearly violates the principle of Melody Music. Accordingly, the Commission should rescind all forfeitures assessed since the February 1, 1994 release of its Policy Statement and decline to issue any new forfeitures until it (1) clarifies the numerous ambiguities presented by the EEO rules and policies; (2) acts on the pending Petition for Reconsideration of the Commission's 1987 EEO Report; and (3) acts on the pending Petitions for Reconsideration of its Policy Statement.

**C. THE FCC SHOULD RAISE THE "LESS THAN 5 FULL-TIME EMPLOYEE" REPORTING EXEMPTIONS TO "LESS THAN 15 FULL-TIME EMPLOYEES"**

43. The Associations urge the Commission to reduce the paperwork burdens on broadcasters by every means possible. The Commission should raise the EEO program reporting exemption for broadcasters from "less than five full-time employees" to "less than fifteen full-time employees." Currently, broadcasters who employ less than five full-time employees are exempt from submitting detailed information on the Annual Employment Report

---

28/(...continued)

(Muskegon licensee who could not identify recruitment sources for 29 of 42 positions, and had minorities in only three of 38 interview pools received reporting conditions).

(FCC Form 395-B), and on the Model Equal Employment Opportunity Program Report which is submitted with license renewal applications and assignment applications (FCC Forms 396, 396-A).

44. The paperwork and time burdens of complying with the reporting requirements of the Commission's EEO rules are significant, and have a disproportionate impact on smaller broadcasters. While large broadcasters may be able afford to designate an employee to spend the majority of his or her time handling the reporting responsibilities of an EEO program, small broadcasters do not have the luxury of designating one employee to work primarily on an EEO program. Broadcasters will still be required to have an EEO program, however, raising the reporting threshold will help alleviate the burdens on broadcast stations that do not have the financial and personnel resources to adequately deal with the administrative burdens associated with the reporting requirements of effective recruitment programs. The Associations do not believe that this will unduly reduce the pool of data that the FCC has available to determine the progress of the broadcast industry in general with regards to enhancing minority and female employment opportunities.

**D. THE FCC SHOULD REAFFIRM THAT IT IS NOT A SECOND  
FEDERAL EEOC**

45. The FCC should reaffirm that it is not a second federal Equal Employment Opportunity Commission ("EEOC"). The FCC never intended to become a substitute for the EEOC. The early FCC decisions concerning the EEO rules clearly expressed the



Commission's desire to not duplicate other agencies' efforts. In Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees,<sup>29/</sup> the FCC stated that it:

do[es] not contend that this agency has a sweeping mandate to further the "national policy" against discrimination, nor have we sought to duplicate the detailed regulatory efforts of specialized agencies such as the EEOC. Instead, we have sought to limit our role to that of assuring on an overall basis, that stations are engaging in employment practices which are compatible with their responsibilities in the field of public service programming.<sup>30/</sup>

Further, the Commission stated that its employment rules "are addressed to the whole public and not to providing individual members of the public with remedies as a result of some discriminatory conduct."<sup>31/</sup> Accordingly, the FCC should refer all complaints regarding discrimination to the EEOC for disposition.

#### **E. THE FCC SHOULD ISSUE A PRIMER ON EEO**

46. The Associations urge the FCC to publish a primer on EEO similar to the FCC's very helpful political time primer. The Associations support the fundamental policy goals of the Commission's EEO rules and recognize that non-discriminatory employment policies and practices are essential licensee

---

<sup>29/</sup> Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees, Report and Order, 60 FCC 2d 226 (1976).

<sup>30/</sup> Id. at 229-30.

<sup>31/</sup> Id. at 230.

obligations. However, for many licensees, understanding exactly what the Commission requires for compliance with its EEO rules is a difficult task due to the uncertainty and ambiguity of those rules. Because licensees face substantial penalties for non-compliance with the Commission's EEO requirements, it is suggested that the Commission publish a primer dedicated to providing concrete, fact-specific EEO guidance to licensees. Such a primer would help to calm the current fear and frustration of the many licensees who implement EEO recruitment programs but remain unsure of the Commission's specific requirements for bullet proof compliance with its EEO rules. The Associations suggest that the EEO primer be prepared similar to the Commission's political time primer, with the Commission's most important EEO rulings and statements of policy included along with specific examples of how the rules apply in illustrative factual situations. With the aid of a primer on the subject, the FCC will have better advanced the fundamental policy goals of the Commission's EEO rules and improved equal employment opportunities for all.

### **III. CONCLUSION**

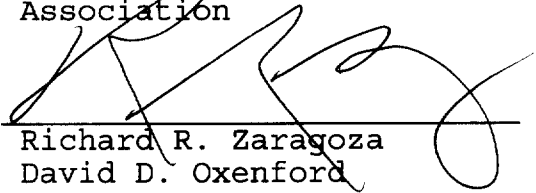
For the foregoing reasons, the Associations request that the Commission adopt the changes proposed herein.

Respectfully submitted,

The Arizona Broadcasters  
Association  
The California Broadcasters  
Association

The Connecticut Broadcasters  
Association  
The Illinois Broadcasters  
Association  
The Iowa Broadcasters Association  
The Kansas Association of  
Broadcasters  
The Kentucky Broadcasters  
Association  
The Louisiana Association of  
Broadcasters  
The Maine Association of  
Broadcasters  
The Maryland/District of Columbia/  
Delaware Broadcasters  
Association  
The Massachusetts Broadcasters  
Association  
The Minnesota Broadcasters  
Association  
The Mississippi Association of  
Broadcasters  
The Missouri Broadcasters  
Association  
The Nebraska Broadcasters  
Association  
The New Hampshire Association of  
Broadcasters  
The North Dakota Broadcasters  
Association  
The Ohio Association of  
Broadcasters  
The Oklahoma Association of  
Broadcasters  
The Oregon Association of  
Broadcasters  
The Utah Broadcasters Association  
The Washington State Association of  
Broadcasters  
The Wisconsin Broadcasters  
Association

By:

  
Richard R. Zaragoza  
David D. Oxenford  
John M. Burgett  
Sharon L. Tasman

Fisher Wayland Cooper Leader  
& Zaragoza L.L.P.  
2001 Pennsylvania Avenue, N.W.  
Suite 400  
Washington, D.C. 20006-1851

Dated: June 13, 1994